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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KURT MILLER, Plaintiff and Appellant, v. MARIA MACIAS, Defendant and Respondent.	B269891 (Los Angeles County Super. Ct. No. BC508679)

APPEAL from an order of the Superior Court of Los Angeles County. Malcolm Mackey, Judge. Affirmed.

Law Offices of Andrew D. Weiss and Andrew D. Weiss for Plaintiff and Appellant.

Fransen & Molinaro, LLP, Nathan Fransen and Paul J. Molinaro for Defendant and Respondent.

Kurt Miller appeals from a trial court order dismissing his action against Maria Macias. In October 2014, the parties stipulated to the appointment of a referee pursuant to Code of Civil Procedure section 638.[1] The trial court subsequently issued several orders to show cause regarding the status of the reference. In August 2015, the trial court dismissed the case. The dismissal order stated the court would retain jurisdiction to enforce any settlement or enter any award pursuant to section 664.6. Miller argues the trial court erred by treating the parties' stipulation to a referee as a settlement, however he has not provided an adequate record to support his claim. We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2013, Miller filed a complaint against Macias and unnamed defendants asserting claims for negligence, fraud, wrongful foreclosure, breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of Business and Professions Code section 17200. The complaint concerned a property Macias sold to Jose and Rosalba Rodriguez, and which the Rodriguezes subsequently sold to Maria Oliva. The Rodriguezes financed the purchase with a loan from Macias; they executed a note agreeing to pay Macias $500,000 with an 8 percent interest rate (Rodriguez Note), secured by a deed of trust on the property. When the Rodriguezes sold the property to Oliva, she financed the purchase with a loan from the Rodriguezes; she executed a note agreeing to pay the Rodriguezes $700,000 with an 8.5 percent interest rate (Oliva Note), secured

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

by a deed of trust on the property. In 2007, Miller purchased the Oliva Note and trust deed.

In February 2013, Macias initiated foreclosure proceedings based on an alleged default under the Rodriguez Note. Miller disputed the amount owing and whether there had been any default. His May 2013 complaint sought, among other things, injunctive relief to prevent Macias from moving forward with a foreclosure sale, declaratory relief concerning the parties' respective rights and duties under the Rodriguez Note, and an order voiding or canceling a notice of default and election to sell under a deed of trust. In June 2013, Miller sought and received a temporary restraining order, preventing Macias or her agents from conducting a non-judicial foreclosure sale of the property. The court set a hearing for an order to show cause (OSC) regarding a preliminary injunction. In July 2013, the parties stipulated to an order dissolving the temporary injunction and taking the OSC hearing off calendar. The stipulation indicated Macias had withdrawn her notice of default and ceased attempts to conduct a nonjudicial foreclosure sale of the property.[2]

In October 2014, the parties stipulated to the appointment of a referee, pursuant to section 638.[3] The stipulation explained:

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[2] Miller had also sued Canary Asset Management, Inc., the trustee. After the trustee canceled the scheduled foreclosure sale and rescinded the Notice of Default, it filed a motion for summary judgment, which the trial court granted. Miller appealed the judgment. In December 2015, this court affirmed the trial court judgment in an unpublished decision (*Miller v. Canary Asset Management, Inc.* (B258413, Dec. 23, 2015)).

[3] Section 638 authorizes the court to appoint a referee upon the agreement of the parties.

"The reason for the appointment is that the trial of this matter involves an issue of fact that requires an examination of a long account involving payments, from 2003 to present. The taking of an account is necessary to resolve the dispute between the parties regarding the payments made and amount now due under a 2003 $500,000 Note secured by Deed of Trust. The reference is limited to the issue of the payments made and the balance owed on the Promissory Note secured by the Deed of Trust which is the subject of this action. All other issues are reserved for resolution by the Court." Under the stipulation, the parties agreed they would jointly appoint the Referee and would not use court facilities. They further agreed the parties would compensate the Referee, splitting the fees and costs equally.

The trial court entered an order based on the stipulation and set a status conference for January 2015. In January 2015, the OSC "regarding status of reference" was continued to April 2015. In April 2015, the hearing was continued to August 2015. In August 2015, the court held the OSC hearing and issued the following minute order: "Order to Show Cause held. Order to Show Cause is discharged. The Court, on its own motion, order[s] this CASE DISMISSED this date and retains jurisdiction to enforce any settlement or enter any award pursuant to Code of Civil Procedure Section 664.6." The order was signed.[4] The parties waived notice. This appeal followed.

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[4] Under section 581d, a dismissal order that is written, signed by the court, and filed in the action constitutes a judgment. (But see *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1234, fn. 5 [encouraging trial courts to use a "separate written order of dismissal, signed by the court and filed in the action, to conclude a case, rather than relying on a signed or stamped minute order."].)

DISCUSSION

Miller Has Not Provided a Record Adequate to Establish Error

On appeal, Miller's sole contention is the trial court erroneously treated the parties' stipulation to the appointment of a referee as a settlement. The only basis for this argument is language in the dismissal order that the court would "[retain] jurisdiction to enforce any settlement or enter any award pursuant to Code of Civil Procedure Section 664.6."

Under section 664.6, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." Though the parties in this case disagree on appeal as to why the trial court dismissed the action, they agree there was no settlement. Further, the court did not enter a judgment pursuant to the terms of a settlement, as section 664.6 contemplates. It is therefore unclear why the dismissal order referenced section 664.6.

However, the inclusion of ultimately ineffective language regarding section 664.6 does not necessarily indicate the trial court treated the reference agreement as a settlement. The order does not state the dismissal was due to a settlement or pursuant to a settlement. Indeed, the order's language suggests the court was aware there was no existing settlement. Miller asks this court to assume the trial court erroneously misinterpreted the parties' express stipulation to have a referee decide limited issues

as a settlement. But it is a well-established principle that judgments and orders of the lower court are *presumed* correct. " ' " 'All intendments and presumptions are indulged to support [the judgment or order] on matters as to which the record is silent. . . .' [Citation.]" [Citations.]' [Citation.] 'The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court [erred].' [Citation.]" (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.) We do not presume or speculate the trial court erred. It is the appellant's burden to overcome the presumption of correctness by offering an adequate record that establishes error. (*Ibid.*)

Miller has not met this burden. There is no reporter's transcript or settled statement. (*Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 186.) Aside from the dismissal order, this court has nothing by which to evaluate Miller's claim that the trial court erroneously treated the parties' stipulation for a referee as a settlement. Further, the limited record before us does not support this claim. The original stipulation was clearly an agreement to have certain issues determined by a referee. Each OSC was regarding the status of the reference. The dismissal order described the nature of the proceedings as "Order To Show Cause RE Status of Judicial Reference." The mention of section 664.6 alone in the dismissal order does not provide a sufficient basis for us to conclude the trial court erroneously construed the parties' stipulation to the appointment of a referee as a settlement.

Moreover, as explained in *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, "[a] number of statutes provide authority for the trial court to terminate a case. For example, Code of Civil Procedure section 575.2 permits dismissal of a case for the

violation of fast track rules where noncompliance is the fault of the party and not counsel. [Citations.] Former Code of Civil Procedure section 2023 permits trial courts to impose terminating sanctions and strike pleadings as a discovery sanction. . . . Additionally, the statutes recognize that the courts have the inherent authority to dismiss an action. (Code Civ. Proc., §§ 581, subd. (m), 583.150; [Citations].) [¶] Trial courts should only exercise this authority in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation [citation], the fault lies with the client and not the attorney [citation], and when the court issues a directive that the party fails to obey. [Citation.]" (*Id*. at p. 799, fn. omitted.)

On the record before us we are unable to determine the dismissal was in error. Miller has failed to provide a reporter's transcript, settled statement, or even a summary of what occurred at any of the scheduled hearings at which the OSC was continued, including the final one at which the court dismissed the case. His sole argument is the court treated the stipulation to the appointment of a referee as a settlement, and the limited record does not support that argument. As another court has noted, " '[i]n the absence of a transcript the reviewing court will have no way of knowing in many cases what grounds were advanced, what arguments were made and what facts may have been admitted, mutually assumed or judicially noticed at the hearing. In such a case, no abuse of discretion can be found except on the basis of speculation.' " (*Snell v. Superior Court* (1984) 158 Cal.App.3d 44, 49.) In his reply brief, Miller disputes Macias's argument that the dismissal was justified by Miller's delay in prosecuting the case; Miller argues the dismissal could

not have been pursuant to sections 583.410 and 583.420 because the court did not give the parties 20 days' notice as required under California rule of Court, Rule 3.1340.[5] However, Miller does not address the other legitimate reasons a court may dismiss a case on its own motion.

The record Miller has provided is inadequate to overcome the presumption of correctness. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) As a result, we must affirm the order.

DISPOSITION

The trial court order is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.

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[5] Under sections 583.410 and 583.420, and California Rules of Court, Rule 3.1340, the trial court has the discretion to dismiss an action if not brought to trial or conditionally settled within two years after the action is commenced against the defendant. Under Rule 3.1340(b): "If the court intends to dismiss an action on its own motion, the clerk must set a hearing on the dismissal and send notice to all parties at least 20 days before the hearing date."